September 12, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Dorothy Pritchett

Date of Filing: August 2, 2005

Case Number: TFA-0112

This decision concerns an Appeal that Dorothy Pritchett (Appellant) filed on August 2, 2005. The Appellant submitted a request for information to the Department of Energy's (DOE) FOIA and Privacy Act Group (FPAG) seeking copies of all information pertaining to her in the files of 16 present or former DOE employees.[1] The FPAG referred a small portion of the Appellant's request, concerning one of these 16 employees, to the Office of Inspector General (IG). On July 16, 2005, the IG issued a Determination Letter in response to that portion of request. The IG's determination identified 72 documents that were responsive to this portion of the Appellant's request. The IG released most of these documents to the Appellant.[2] However, the IG withheld significant portions of this information under FOIA Exemptions 6, 7(A), 7(C) and 7(D). On August 2, 2005, the Appellant filed the present Appeal, contending that the IG's withholding of the information was improper.[3]

While the FOIA generally requires that information held by government agencies be released to the public upon request, Congress has provided nine exemptions to the FOIA, which set forth the

[1] The request was submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004.

[2] Apparently, the IG's Determination Letter pertained to 40 of these documents. The Determination Letter indicated that the other 32 responsive documents had been previously supplied to the Appellant.

[3] The Appeal also requests in her Appeal, copies of "all emails and documents in the actual or constructive possession of Inspector General Gregory Friedman, Stephan Durbin and/or Barbara Hall."' Appeal at 1. The Appellant's request is untimely, and cannot be made on appeal, since she did not request this information in her original request. We do not permit FOIA appellants to broaden their requests for information in their appeals. Alan J. White, 17 DOE **&** 80,117, 80,539 (1988); see also Arthur Scanla, 13 DOE **&** 80,133 at 80,622 n.2 (1986). Since the Appellant now wishes to obtain information of a broader nature than that which she sought initially, her broadened request constitutes a new request for information. She must therefore file a new request for information with the FPAG in order to obtain the information she is seeking. The Appellant also requests an opportunity for oral argument and an evidentiary hearing. These requests are denied. The DOE FOIA Regulations contain no provision for hearings during the adjudication of an administrative appeal.

types of information agencies are not required to release. Exemptions 6, 7(A), 7(C) and 7(D) are at issue in the present case.

Exemption 7(A)

The Determination Letter withheld the entire case file of a pending IG investigation under Exemption 7(A). The threshold requirement in any Exemption 7 inquiry is whether the documents are compiled for law enforcement purposes, i.e., as part of or in connection with an agency law enforcement proceeding. *FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81 & n.46 (D.C. Cir. 1974); *Williams v. IRS*, 479 F.2d 317, 318 (3d Cir. 1973), *cert. denied sub nom. Donolon v. IRS*, 414 U.S. 1024 (1973). In order to withhold information under Exemption 7, an organization must have statutory authority to enforce a violation of a law or regulation within its authority. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979) (remanding to Naval Investigative Service to show that investigation involved enforcement of statute or regulation within its authority). By law, the IG is charged with investigating waste, fraud, and abuse in programs and operations administered or financed by the DOE. 5 U.S.C. Appendix 3 § 4. The IG is, therefore, a classic example of an organization with a law enforcement mandate. In the present case the IG's investigatory actions were clearly within this statutory mandate.

Determining the applicability of Exemption 7(A) in particular requires a two-step analysis focusing on (1) whether a law enforcement proceeding is pending and (2) whether release of information about it could reasonably be expected to cause some foreseeable harm to the pending enforcement proceeding. *See Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (agency must make a specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings); *Crooker v. ATF*, 789 F.2d 64, 65-67 (D.C. Cir. 1986) (agency had failed to demonstrate that disclosure would interfere with enforcement proceedings); *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986) ("government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

In applying these standards in the past, the courts have found that agencies are not required to make a particularized, case-by-case showing of interference with their investigations. Rather, a generic determination of likely interference is sufficient. *See Murray, Jacobs & Abel*, 25 DOE ¶ 80,130 (1995) (*Murray*); *NRLB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 224 (1978); *Crancer v. Department of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993). It is important to note that even though an agency "need not justify its withholding on a document-by-document basis in court, [it] must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (*Bevis*). Thus, when an agency elects to use the "generic" approach, it "has a three-fold task. First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign the documents to the proper category. Finally, it must explain how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90; *Murray*, 25 DOE at 80,576.

Both the statute and the DOE's FOIA regulations require the agency to provide a reasonably specific justification for any withholdings. 5 U.S.C. ' 552(a)(6); 10 C.F.R. ' 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc*., 26 DOE & 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE & 80,118 (1979). A reasonably specific justification of a withholding allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc*., 26 DOE & 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE & 80,109 at 80,517 (1992).

Turning to the present appeal, we find that the IG has provided a sufficient description of the withheld records. The determination letter indicates that the information withheld under Exemption 7(A) is the case file for a currently pending IG investigation. Determination Letter at 1. The IG states, "The material that is withheld under Exemption 7(A) includes documents pertaining to an ongoing investigation and includes case processing forms, memorandum of interviews and investigative activity." Determination Letter at 1.

The determination letter also provides a sufficient articulation of the harm that could reasonably be expected to occur if the withheld information was released. Specifically the determination letter notes that:

> Release of the withheld material at this time could prematurely reveal evidence and interfere with the ongoing enforcement proceeding. . . . [R]elease could tend to prematurely disclose enforcement efforts, or provide individuals involved in the investigation an opportunity to fabricate defenses, destroy evidence, intimidate actual or potential witnesses, or otherwise impede an appropriate resolution of the investigation.

Determination Letter at 2. Since we agree with the reasoning set forth by the IG in its determination letter, we find that the IG has properly withheld the information under Exemption 7(A).

Exemptions 6 and 7(C)

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

Exemption 7(C) allows an agency to withhold "records or information compiled for law enforcement purposes, if release of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C); 10 C.F.R. § 1004.10(b)(7)(iii).

In order to determine whether a record may be withheld under either Exemption 6 or 7(C), an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to either of the exemptions. *Ripskis v. Department of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Committee*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record either (1) would constitute a clearly unwarranted invasion of personal privacy (the Exemption 6 standard), or (2) could reasonably be expected to constitute an unwarranted invasion of personal privacy (the Exemption 7(C) standard). *See generally Ripskis*, 746 F.2d at 3.

The IG has found a privacy interest in the identities of the individuals whose names have been withheld. The Determination letter states in pertinent part:

> Names and information that would tend to disclose the identity of certain individuals have been withheld pursuant to Exemptions 6 and 7(C). Individuals involved in the OIG enforcement matter, which in this case includes witnesses, sources of information, and other individuals, are entitled to privacy protections so that they will be free from harassment, intimidation and other personal intrusions.

Determination Letter at 2. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative files. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual); *Cucarro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir. 1985). Accordingly, we have followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80,117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990). Therefore, we find that release of the individuals' identities would result in significant invasions of privacy.

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to

the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something *directly* about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.*; *see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against an insubstantial or non-existent public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Accordingly, we find that the identities of the individuals were properly withheld under Exemptions 6 and 7(C). *See, e.g.*, *Tod Rockefeller*, 26 DOE ¶ 80,238 (1997).

Exemption 7(D)

Finally, the IG has withheld information under Exemption 7(D), claiming that (1) release of this information would reveal confidential sources, or (2) the information was supplied by confidential sources. Determination Letter at 2. Exemption 7(D) allows for the withholding of "Records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source . . . [or] information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D) (1994). "Exemption 7(D) is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, s*ee Brant Construction v. United States EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985), and (2) "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985)." *Ortiz v. Department of Health and Human Services*, 70 F.3d 729, 732 (2d Cir. 1995) (*Ortiz*). As the court stated in *Ortiz:* "[A] source is confidential within the meaning of Exemption 7(D) if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id., citing United States v. Landano*, 508 U.S. 165; 113 S. Ct. 2014, 2019 (1993).

After conducting an in-person review of the information that the IG withheld under exemption 7(D), we are assured that the information was supplied by confidential sources and that its release would identify those confidential sources. Accordingly, we find that the information withheld by the IG under this exemption was properly withheld.

For the reasons set forth above, we have found that the Office of Inspector General's withholdings under Exemptions 6, 7(A), 7(C) and 7(D) were appropriate.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Dorothy Pritchett on August 2, 2005, Case Number TFA-0112, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 12, 2005